BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMIE C. BRIER Claimant VS. **DILLARD'S** Respondent AND **FIDELITY AND GUARANTY INS. CO.** Insurance Carrier	)	Docket No. 1,037,935

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 16, 2008, preliminary hearing Order for Compensation and Nunc Pro Tunc Order for Compensation entered by Administrative Law Judge Brad E. Avery. George H. Pearson, of Topeka, Kansas, appeared for claimant. Robert J. Wonnell, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered a personal injury by accident that arose out of and in the course of her employment with respondent. Respondent was ordered to provide medical care for claimant with Dr. John Ebeling and to provide claimant with temporary total disability compensation at the rate of $195.09 per week beginning October 18, 2007, until further order, until claimant reaches maximum medical improvement, or until claimant is provided medical restrictions which respondent is able to accommodate at the same or comparable wage, whichever event arises first.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 16, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent admits that claimant suffered a compensable accident on February 22, 2007, but disputes that claimant's current injuries and need for medical treatment result from that accident. Instead, respondent argues that claimant suffered a temporary strain or sprain to her right shoulder that was treated and resolved. Accordingly, her subsequent conditions did not arise out of the scope and course of her employment but are the result of her preexisting conditions and/or a subsequent non-work related injury. Respondent also contends that claimant's present symptoms did not begin while she was working but while she was on a leave of absence from work to repair her home after it was flooded. Respondent requests that the Board find that claimant's present injuries and need for treatment are unrelated to her employment.

Claimant argues that she has met her burden of proof by a preponderance of the evidence that her medical condition was the result of her work accident of February 22, 2007, and, therefore, requests that the Board affirm the ALJ's Order for Compensation and Nunc Pro Tunc Order for Compensation.

The issue for the Board's review is: Is claimant's injury and current need for medical treatment a direct result of her February 22, 2007, accident at work? Stated another way, did it arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant went to work for respondent in November 2004 as a sales associate. Back in 1992, she was involved in an automobile accident that resulted in surgery to her cervical spine. She had not had significant problems with her neck since the 1992 surgery until her work-related accident.

On February 22, 2007, while at work, claimant tripped over the base of a clothing rack and fell on her right shoulder and neck. She hit the floor hard, and it took awhile for her to get her breath. She reported her fall to her manager, Danita Collins. About two weeks after her fall, she talked to Christine Collins, respondent's operations secretary, and asked to see a doctor. Her neck and shoulder were still sore, and she wanted to have it checked out to make sure everything was okay. Christine Collins sent claimant to Tallgrass Immediate Care (Tallgrass).

Claimant was seen at Tallgrass on March 7, 2007, at which time she was complaining of right shoulder pain. She denied any numbness. She admitted she had a history of non-work related right shoulder pain, for which she previously had physical therapy. She was diagnosed with right shoulder strain. She was given a prescription for Relafen, was encouraged to do home exercises, and was told she could continue her work activities. Although the medical records from Tallgrass indicate claimant was told to follow

up in two weeks if not improving, she testified she does not remember being told to follow up.

Claimant took personal leave from May 5, 2007, until July 20, 2007, because her home had been flooded. She did not do any heavy physical labor in cleaning up after the flood but hired someone to do it for her. When she left work for the leave of absence, she still had a dull pain in her neck and shoulder. Danita Collins testified that she went to see claimant at her house during the period of time that she was taking a leave of absence. At the time, claimant was dressed in shorts and a tee shirt. Claimant mentioned to her that she had been going through some things, but she never saw claimant perform any work.

Towards the end of April or first part of May 2007, claimant started feeling tingling in her hands and then noticed it in her feet. In June, she called Christine Collins and told her she was going to go back to the doctor. Ms. Collins did not tell her she could not go back, so it was her understanding that she could return to Tallgrass. In July, claimant started noticing weakness in her legs and began to fall. She went back to work on July 21.

On July 5, 2007, claimant returned to Tallgrass. She admitted she did not call respondent immediately before going. At Tallgrass, she complained of pain in her right shoulder and arm, as well as numbness in her bilateral finger tips and feet. Tallgrass ordered MRIs of her cervical, thoracic and lumbar spine, as well as an EMG and consultation with Dr. Wade Welch. Dr. Welch diagnosed claimant with posttraumatic cervical radiculomyelopathy secondary to her fall at work and recommended expediting a surgical evaluation. Dr. Welch referred claimant to Dr. John Ebeling, a neurosurgeon.

Claimant saw Dr. Ebeling on September 10, 2007. Dr. Ebeling, after examining claimant, believed she was having increasing signs of quadriparesis due to cord compression at the C4-5 level. This had worsened after a recent fall. At that time, he recommended surgery to prevent worsening of her quadriparesis. Dr. Ebeling opined "I think [claimant] had some pre-existing cervical stenosis and spondylosis which was then aggravated by her falls [*sic*] at work. I think it is work related."[12]

In late August or early September, claimant started using a walker at work. She had been told by Dr. Welch that her gait was so bad that she needed something to prevent her from falling. She said that her legs would buckle and she would have no warning. She believed she had fallen as many as 15 to 20 times. Claimant stopped working on September 14, 2007, because she could not perform her job with a walker. She never asked respondent for a different job. Her supervisor, Danita Collins, testified that had claimant asked for a different job, respondent would have accommodated her.

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[1] P.H. Trans., Cl. Ex. 11.

Dr. Alexander Bailey examined claimant on October 17, 2007, at the request of respondent. Claimant complained of neck pain, shoulder pain, arm pain, instability in terms of balance, low back pain, and bilateral leg pain. She also complained of generalized weakness. Claimant had a previous fusion of C5-6 and C6-7 in 1992. She had been told she should now have surgery to fuse C3-4 and C4-5. Dr. Bailey reviewed the MRI scan, which showed moderate to severe spinal stenosis at C3-4 and C4-5 and to a lesser degree at C6-7. He said there were level failures at C3-4, C4-5 and C7-T1 adjacent to claimant's previous fusion. Her low back showed spinal stenosis at L4-5 and probable low grade spondylolisthesis of L4-5. EMG and nerve conduction reports indicated C5 radiculopathy on the left and minimal sensory polyneuropathy.

Dr. Bailey diagnosed claimant with adjacent level breakdown of spinal stenosis and instability at C3-4, C4-5 and C7-T1 with probable associated myelopathy and long tract signs, as well as spondylolisthesis, degenerative disc disease, and spinal stenosis at L4-5.

Dr. Bailey agreed with Dr. Ebeling that claimant needed cervical decompression and fusion surgery at multiple levels and said her work ability could not be addressed until after the surgery. He stated that claimant should be off work until such time as her cervical spine can be addressed. Dr. Bailey considered it likely that claimant would also require lumbar decompression and fusion at L4-5 but that the cervical area needed to be addressed first.

Concerning causation, Dr. Bailey said that he would deem the vast majority of her condition to be preexisting and related to her previous surgery in 1992. He acknowledged that claimant developed some symptomatology associated with her fall. He stated:

> Even if one takes into consideration that the fall may have contributed to a worsening disc bulge or a discal herniation, particularly at C4-5, the propensity for this development is by far more related to her previous cervical spinal fusion in 1992 than could be assigned to this fall . . . .[3]

Dr. Bailey opined that claimant's low back condition was preexisting in its entirety.

Dr. Edward Prostic examined claimant on January 9, 2008, at the request of claimant's attorney. Claimant was in a wheelchair when he saw her. He stated that claimant sustained injury on February 22, 2007. He opined that her initial right shoulder pain was not so much from injury to the shoulder as it was C4 or C5 radiculopathy. He stated that claimant had progression of her cervical radiculomyelopathy and needed to have surgery as soon as possible. He found that she was temporarily totally disabled.

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[3] *Id.*, Resp. Ex. 1 at 6.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[4]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

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[4] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[5] K.S.A. 2007 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[7] *Id.* at 278.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[9]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

Claimant testified that she injured her neck and right shoulder in her fall at work on February 22, 2007. She was able to continue working but was real sore. After two weeks, the soreness persisted, so she sought medical treatment. About the same time as when her home was flooded and she took the leave of absence from work, claimant began experiencing tingling in her hands and feet. This eventually progressed to weakness in her legs, and she began falling. She fractured her right ankle in one of those falls when her legs suddenly just gave out. Claimant denies performing any heavy work during her leave of absence. Although she has had prior neck and shoulder problems, including fusion surgery to her cervical spine, claimant was not having symptoms before her fall at work. Claimant relates her current symptoms to her fall at work. Although to varying degrees, all of the treating and examining physicians seem to agree that claimant's February 22, 2007, fall at work contributed to her current condition. Even Dr. Bailey attributes a small degree of contribution for the cervical condition to the work-related accident. Drs. Ebeling, Welch and Prostic apportion claimant's condition to her accident at work to a much greater degree.

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[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374,Syl. ¶ 1, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, Syl. ¶ 4, 547 P.2d 751 (1976)*; Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 336, 678 P.2d 178 (1984).

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, Syl. ¶ 3, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[10] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2006 Supp. 44-555c(k).

CONCLUSION

Based upon the record presented to date, claimant has met her burden of proving that her current condition and need for treatment is attributable to her February 22, 2007, accident and, therefore, arose out of and in the course of employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation and the Nunc Pro Tunc Order for Compensation of Administrative Law Judge Brad E. Avery dated January 16, 2008, are affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge